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The Cantamar LLC v. Champagne : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE CANTAMAR LLC, Plaintiff and Appellee, vs. CARLTON J. CHAMPAGNE; LON E. WILLIAMS; and DATA SYSTEMS INTERNATIONAL, INC., Defendants and Appellants.	APPELLANTS' REPLY BRIEF Appellate Case No.20050778CA Trial Court Case No. 030600077 Appeal

The Court and Judge below: Second Judicial District Court, Davis County, Layton Department, State of Utah, Judge Darwin C. Hansen.

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I.

THE NOTE IS NOT AN INTEGRATED AGREEMENT

A. The *Novell* Case is Not Applicable to the Facts of the Present Case.

Plaintiff relies on *Novell, Inc. v. The Canopy Group, Inc.*, 92 P.3d 768 (Utah App. 2004), for the proposition that the Note was integrated and therefore parole evidence was inadmissible. (Brief of Appellee, 18-25). Plaintiff's reliance is misplaced. The facts distinguish *Novell* from the present case.

The defendant in *Novell* asserted that the written agreement was subject to a contemporaneous oral agreement modifying its terms. 92 P.3d at 771. The Utah Court of Appeals held, however, that no such agreement was made. *Id.* at 774. Instead, the evidence showed that during the negotiations over royalties, there had been *draft* agreements containing a formulation favorable to Canopy in deducting litigation fees and costs from royalties. *Id.* However, by mutual agreement of the parties, the term favorable to Canopy was removed from the final agreement. *Id.*

The removal of the litigation expense deduction by mutual agreement of the parties is conclusive. Because the parties came to a final and complete agreement not to deduct litigation expenses from royalties, the written agreement had become partially integrated as to that question and parol evidence of a different deal was properly excluded.

The present case would be like *Novell* if Cantamar's agent, Thuett, and DSI's representatives had initially discussed whether the "Due Date" in the Note should be subject to a condition for obtaining a $15 million loan, had included that condition in a prior draft of the Note, and then in a final negotiating session had fully explored the issue and after considering it at length had agreed to remove it, leaving only the "Due Date."

But that did not happen. The Note was a form generated by Thuett off his computer with no prior discussion of its terms. (Champagne Aff., ¶26, R. 66). Like its predecessors, the Note contained a "Due Date." (*Id.*, Exh. G; R. 92). But, as with its predecessors, there was no expectation that the due date would be enforced unless the $15 million loan were first procured from which

to repay the Note. (*Id.*, ¶24; R. 65). Far from agreeing to remove the condition for a $15 million loan, the parties reaffirmed it at the final meeting, then signed the Note. (*Id.*, ¶26; R. 66).

The facts of this case require a different outcome than in *Novell*. They require the outcome reached by the Utah Supreme Court in *Union Bank v. Swenson*, 707 P.2d 663 (Utah 1985). (*See* discussion of *Union Bank* in the Brief of Appellants, 34-35).

In *Union Bank*, as in the present case, the trial court applied the parol evidence rule, refused to consider an oral agreement for a condition precedent, and granted summary judgment. 707 P.2d at 664-665. The Utah Supreme Court reversed, holding that the evidence of a condition precedent was admissible and was sufficient to rebut the presumption of integration. *Id.*, at 666.

B. DSI's Evidence Rebuts the Presumption of Integration.

Cantamar argues that DSI has failed to present sufficient evidence to overcome the rebuttable presumption of integration under the standard established in *Novell*. (Brief of Appellee, 23). Cantamar's argument, however,

disregards the fact that *Novell* did not discuss or establish a standard for overcoming the presumption. There was no need to, because in *Novell* there was no oral agreement to challenge the presumption. *Novell, supra,* 92 P.3d at 774.

The standard was, however, elucidated in *Union Bank*. There, the Utah Supreme Court held that evidence sufficient to create a genuine issue of material fact on the issue of integration was sufficient to rebut the presumption for purposes of summary judgment. *Union Bank, supra,* 707 P.2d 665-666.

C. Cantamar is Bound by Thuett's Course of Dealing.

Course of dealing may be considered in deciding whether an agreement is integrated. *Eie v. St. Benedict's Hospital,* 638 P.2d 1190, 1195 (Utah 1981).

Cantamar does not take issue with the legal principle in *Eie*. Rather, Cantamar argues that "course of dealing" does not matter in the present case because the course of dealing on the prior notes was between DSI and "another party." (Brief of Appellee, 31). The "other party", of course, was Cantamar's agent, Troy Thuett.

Cantamar cannot so easily disown Mr. Thuett. Glenn Britt, the manager of Cantamar, admitted in his deposition that Troy Thuett's actions in meeting with DSI, preparing the Note, and obtaining DSI's signatures, were all done at the request of Cantamar. Britt Deposition, 47; R. 273.

Mr. Britt also admitted that Thuett acted as Cantamar's agent in his course of dealing with DSI prior to the Note. At the second hearing on summary judgment in the court below, the following summary of Britt's testimony was provided by Cantamar's attorney:

> Mr. Britt's testimony in his deposition was that he, though the prior notes were funded by - or in the name of Mr. [Thuett's] company that Cantamar provided the funding for all of those notes through this broker. Cantamar is the one who provided the money for the notes either prior or at the time of this note.

Tr., at 61 (emphasis added).

Cantamar's admission was understood by the court below to mean that Thuett was Cantamar's agent. Judge Hansen stated his understanding as follows:

> [T]he defendants in this case claim that no money is due and owing and with respect to Paragraph 8, that was disputed on the theory that [Thuett] was an agent of the plaintiff and I think that's acknowledged by both sides that the money was paid for the prior notes by Cantamar and [Thuett] was

> the agent that arranged for those loans payable to the defendants.

Tr., at 63-64 (emphasis added).

For purposes of summary judgment, it must be concluded that Thuett was acting as Cantamar's agent, not only in obtaining the Note, but also in connection with the prior notes.

Cantamar's relationship with Thuett is established not only by Cantamar's admissions, but by Cantamar's actions in pursuing collection of the Note. In *Central Bank of Bingham v. Stephens,* 199 P. 1018 (Utah 1921), the Utah Supreme Court faced a fact situation similar to the one in the present case: a bank's agent obtained a promissory note subject to an oral agreement that it would not be enforced. *Id.,* at 1019. The bank's successor tried to enforce the note and wanted to disregard the agent's promises, but the Utah Supreme Court would not allow that:

> [The bank] could not in one breath be heard to say that Kelly is without authority to bind it as his agent and in the next breath insist that it, nevertheless, can avail itself of only so much of the transaction as was beneficial to it and repudiate all the rest. If it relies upon the note it must take it precisely as Kelly took it, namely, with the conditional agreement under which it was taken. It must either do that or not take

> it at all. The law is well settled that, in case a principal seeks to recover upon a contract in which the agent exceeded his authority, he must take the contract as a whole. ... An action to enforce notes taken by an assumed agent ratifies his act in taking them, and opens the door to a defense based upon his misrepresentations in obtaining them, or charges the principal with knowledge which the agent possessed concerning their consideration.

Central Bank, supra, 199 P. at 1022 (emphasis added).

By suing to recover on the Note, Cantamar ratified Thuett's actions and the representations by which he obtained the Note. In addition, Cantamar is charged with the knowledge Thuett had of DSI's reliance on his representations in signing the Note. The course of conduct between Thuett and DSI is an integral part of that knowledge and reliance and cannot be disavowed by Cantamar.

II.

THE NOTE WAS AMBIGUOUS

A. *Colonial Leasing* Supports a Determination That the Note Was Ambiguous.

Cantamar argues that the *Colonial Leasing*[1] case does

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[1] *Colonial Leasing Company of New England, Inc. v. Larsen Brothers Construction Co.*, 731 P.2d 483 (Utah 1986).

not support DSI's position in this appeal. (Brief of Appellee, 25-27). Cantamar argues, first, that the holding in *Colonial Leasing* was based on provisions in the writing rather than the oral agreement; and second, that in contrast with the present case the oral agreement in *Colonial Leasing* was not inconsistent with the lease. (*Id.*)

Cantamar's reading of *Colonial Leasing* is incomplete. The rule in *Colonial Leasing* was based on two equally important, independent grounds: (1) the terms of the lease suggested that it was really a sale; and (2) the oral purchase option also suggested that it was really a sale. 731 P.2d at 485, 487. The language of *Colonial Leasing* suggests that the oral option, by itself, would have been sufficient grounds for reversal of summary judgment: "[A]ppellant has alleged an oral option ... and that is sufficient to create an issue of fact." *Id.*, at 488.

Near the end of the *Colonial Leasing* opinion, the Supreme Court cited with approval to the case of *FMA Financial Corp. v. Pro-Printers,* 590 P.2d 803 (Utah 1979), in which evidence of an oral option was admitted at trial over objection. *Colonial Leasing, supra,* 731 P.2d at 487-

488. The Court likened *Colonial Leasing* to *Pro-Printers* in that in both cases evidence of an oral purchase option created an issue of fact as to the meaning of the contract and was admissible despite the parol evidence rule. *Id.*

In its discussion of the *Pro-Printers* case, the Court in *Colonial Leasing* made the following observation:

> In any event, the agreement in this case, for an oral option, if any, is not inconsistent with the express terms of the agreement.

Id. (emphasis added).

Cantamar seizes on this statement to distinguish *Colonial Leasing* from the present case. (Brief of Appellee, 27). Cantamar argues that the condition precedent in the present case is "directly inconsistent" with the Note, making this case different from *Colonial Leasing.* (*Id.*)

Cantamar's argument is not consistent with Utah case law. As will be shown in Argument III below, oral agreements which merely condition the effectiveness of written terms are not inconsistent with those terms.

B. The Note Is Ambiguous Under the Doctrine of Practical Construction.

In its opening brief, DSI argued that under the

doctrine of practical construction, the "Due Date" in the Note was ambiguous because none of the due dates in prior notes had been enforced. (Brief of Appellants, 23-24).

In response, Cantamar argued the Due Date was significant, as shown by the fact that prior notes were rolled into new notes with new maturity dates. (Brief of Appellee, 17).

Both parties are drawing inferences from the facts. The difference is, that on a motion for summary judgment, only the inferences that favor DSI may be considered:

> If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment.

Frisbee v. K & K Construction Co., 676 P.2d 387, 389 (Utah 1984) (emphasis added).

For purposes of summary judgment, Cantamar's inference must be disregarded and DSI's inference must be accepted if fairly drawn from the evidence. The fairness of DSI's inference was shown in the Brief of Appellants, 23-27.

III.

THE NOTE WAS MADE SUBJECT TO A CONDITION PRECEDENT

In its opening brief, DSI relied on ***FMA Financial Corporation v. Hansen Dairy, Inc.***, 617 P.2d 327 (Utah 1980). In response, Cantamar makes two arguments in an attempt to weaken ***FMA***. First, Cantamar argues that ***FMA*** only admits conditions precedent that are not inconsistent with the written agreement. (Brief of Appellee, 28). This argument fails, however, because parol evidence of a condition precedent to a payment obligation is not inconsistent with the payment obligation. This rule has been repeatedly recognized by the Utah Supreme Court. For example, in ***Central Bank***, the Court stated:

> [I]f a written instrument is delivered upon an express condition, and is not to be effective until the condition is fulfilled, the condition upon which it was delivered ... may be shown by parol, and the effect of merely doing that is not to vary the terms of the written instrument.

Central Bank of Bingham v. Stephens, 199 P. 1018, 1021 (Utah 1921).

The same rule was followed in ***Parker v. Weber County Irr. Dist.***, 236 P. 1105 (Utah 1925):

> [W]here a written instrument, regardless of its nature or conditions, is delivered upon the express agreement or understanding by the parties that the instrument shall not become effective except upon the happening of a certain event or not until some act or condition shall have been performed, the instrument does not become effective until the happening of the event or performance of the act or condition. Moreover, the conditional delivery may always be shown by parol. [cite omitted] Such evidence does not vary the terms of the contract, but it merely shows when the same became effective.

Parker, supra, 236 P. at 1107 (emphasis added); *accord, Nuttall v. Berntson,* 30 P.2d 738, 741 (Utah 1934); *Utah-Idaho Sugar Co. v. State Tax Commission,* 73 P.2d 974, 977 (Utah 1937); *FMA, supra,* 617 P.2d at 329.

The only Utah case not in accord with the foregoing authorities is *Bushnell Real Estate, Inc. v. Nielson,* 672 P.2d 746, 749 (Utah 1983), cited by Cantamar in the Brief of Appellee at pages 28 and 29. The Utah Supreme Court has recognized that *Bushnell* is outside the mainstream and that its ruling represents a "much stricter application of the parol evidence rule." *SCM Land Company v. Watkins & Faber,* 732 P.2d 105, 108 n. 3 (Utah 1987).

The strictness of the ruling in *Bushnell* may be explained by the fact that there was no evidence of any

discussion, let alone any agreement, between the parties. 672 P.2d at 750. The evidence merely showed a "subjective and uncommunicated intent that payment be conditioned." *Id.*

In contrast to *Bushnell*, in the present case the condition precedent was an express oral agreement based on repeated face to face communications between DSI and Cantamar. (R. 60-67).

Cantamar's second argument against application of *FMA* is that *FMA* is limited to situations where the condition precedent prevents the "effectiveness" of the agreement. (Brief of Appellee, 29-30). Cantamar argues that DSI has admitted the "effectiveness" of the Note, and therefore that *FMA* does not apply to this case. (*Id.*)

Cantamar bases its argument on certain selected facts culled from the record, such as that DSI has acknowledged a debt owed to Cantamar, that the debt accrues interest, that DSI has made some interest payments, and that DSI believed the Note would be rolled over when it came due. (*Id.*, 29).

None of the facts listed by Cantamar constitutes an admission of the "effectiveness" of the Note for purposes of summary judgment. Any inference from those facts that might

be favorable to Cantamar must be disregarded. *Frisbee, supra*, 676 P.2d at 389.

IV.

FAILURE OF THE CONDITION PRECEDENT DOES NOT TRIGGER DSI'S PAYMENT OBLIGATION WHERE FAILURE WAS NOT THE FAULT OF DSI

Cantamar argues that more than a reasonable time has elapsed since failure of the condition precedent and therefore the obligation must be deemed immediately due and payable in full. (Brief of Appellee, 30-31). There are two defects in Cantamar's argument.

A. Cantamar's Argument is Not Supported by Utah Case Law.

Cantamar cited no Utah case law in support of its argument and did not attempt to distinguish the following Utah law relied on by DSI: "Failure of a material condition precedent relieves the obligor of any duty to perform." *Harper v. Great Salt Lake Council, Inc.*, 976 P.2d 1213, 1217 (Utah 1999) (emphasis added).

Cantamar did cite case law from other jurisdictions, but that case law can be distinguished, as shown below.

B. The Two Cases Cited By Cantamar Are Distinguishable.

Cantamar cited two cases: *Cheyenne Dodge, Inc. v. Reynolds and Reynolds Company,* 613 P.2d 1234 (Wyo. 1980); and *Sherman v. Ingelman,* 138 P.2d 698 (Cal. App. 1943). (Brief of Appellee, 30-31). Both are distinguishable.

In *Cheyenne Dodge*, the defendant did not even allege the existence of an oral agreement for a condition precedent. 613 P.2d at 1235-1236. Instead, the defendant argued that a condition precedent should have been implied from the wording of the written agreement. *Id.* This the court refused to do. *Id.*, at 1236.

In the present case, in contrast, DSI has submitted facts showing an express oral agreement for a condition precedent. (R. 60-67).

The second case cited by Cantamar was the *Sherman* case. In that case, repayment of a promissory note for $11,000 was conditioned on the sale of a building owned by the obligor. 138 P.2d at 700. The building, worth between $250,000 and $300,000, was subject to a mortgage of only $123,000. *Id.* Seven years had passed since the signing of the note. *Id.*, at 699. The appeals court found that enough time had gone

by and the obligor had not made reasonable efforts to fulfill the condition or pay the note. *Id.*, at 701.

Under those facts, the *Sherman* court held that where the fulfillment of the condition is wholly within the power of the obligor, and the obligor makes insufficient effort to fulfill it, the court may impose a time limit and require diligence. 138 P.2d at 700.

The present case is different from *Sherman*. DSI was powerless to fulfill the condition. Only Cantamar could do that. DSI should not be punished for Cantamar's failure to perform.

California case law applies a different rule in situations where the failure of the condition is not the fault of the obligor. In *Haines v. Bechdolt*, 42 Cal.Rptr. 53 (Cal. App. 1965), an architect entered into a written agreement to provide drawings for a motel addition. *Id.*, at 54. Services were provided and partial payment made. *Id.*, at 54-55. The architect sued for the balance due. *Id.* The motel owners claimed there was a verbal agreement that no payment would be made unless financing was obtained, and no financing had been obtained. *Id.*, at 54.

On appeal, the California Court of Appeals held as follows: (1) the verbal agreement was a condition precedent; (2) it was admissible because it did not vary the written terms but rather conditioned their effectiveness; and (3) for that reason, the written agreement never took effect. *Id.*, at 55-56. The court further determined, however, that the motel owners had made a partial payment, which meant they intended to pay a reasonable amount for the architect's services. Based on that, the court remanded for determination of the reasonable amount of those services. *Id.*, at 58.

The reasoning and result of *Haines* should be applied in the present case. This case should be remanded for a determination as to whether there was a verbal agreement conditioning repayment of the Note on the obtaining of a $15 million loan by Cantamar. If there was, the court below should determine whether the evidence indicates an intention to repay the loans obtained through Thuett on reasonable terms, and if so, what those terms should be.

V.

"REASONABLE RELIANCE" IS A QUESTION OF FACT

Cantamar argues that DSI's fraud defense must fail as a matter of law because DSI could not have reasonably relied on Thuett's promises. (Brief of Appellee, 33-37). Cantamar supports this argument in part by contending that cases favoring DSI do so because the misrepresentation goes to the "character" or "nature" of the document, whereas cases favoring Cantamar feature misrepresentations about the "contents" of the documents. (Brief of Appellee, 34-37). To the extent that this is true, the argument favors DSI, not Cantamar.

The underlying question is, would reading the document correct the factual error? If so, then failure to read the document may be fatal. *See, e.g., Johnson v. Allen,* 158 P.2d 134, 137 (Utah 1945); *Rubey v. Wood,* 373 P.2d 386, 387-388 (Utah 1962); *Gold Standard, Inc. v. Getty Oil Co.,* 915 P.2d 1060, 1067 (Utah 1996).

On the other hand, if the misrepresentation is not a direct contradiction of the writing, but instead is a promise not to enforce the written terms, or a promise to

enforce only on the happening of some condition, then reading the document would not correct the error. In those situations, the contents of the document are not decisive, especially on summary judgment. *See, e.g., Union Bank, supra,* 707 P.2d at 664; *Berkeley Bank for Cooperatives v. Meibos,* 607 P.2d 798, 800-801 (Utah 1980); *W.W. and W.B. Gardner, Inc. v. Mann,* 680 P.2d 23, 24 (Utah 1984).

In the present case, the contents of the Note are not decisive. The oral agreement in the present case does not vary the terms of the written agreement, but instead sets up a condition to those terms becoming effective. For that reason, it cannot be said as a matter of law that the written terms themselves are so dispositive as to preclude reasonable reliance on the oral agreement.

VI.

MUTUAL MISTAKE IS A VIABLE DEFENSE IN THE PRESENT CASE

Cantamar cites *Warner v. Sirstins,* 838 P.2d 666, 670 (Utah App. 1992) for the proposition that mutual mistake requires mistake as to the "actual contents" of a writing. (Brief of Appellee, 37). It is true that mistake as to the

actual contents is one of 3 alternative bases for mutual mistake that are identified in *Warner*, but it is not the exclusive basis.

The full quote from *Warner* is as follows:

> The power to reform a written instrument for mutual mistake exists when <u>any one of the following circumstances</u> is satisfactorily proved: (1) the instrument as made failed to conform to what both parties intended; (2) the claiming party was mistaken as to its actual content and the other party, knowing of the mistake, kept silent; or (3) the claiming party was mistaken as to its actual content because of fraudulent affirmative behavior by the other party.

Warner, supra, 838 P.2d at 670 (emphasis added).

"Actual content" is only one of 3 alternatives. DSI relies primarily on one of the other alternatives, that "the instrument as made failed to conform to what both parties intended." *Id.* Based on the evidence presented by DSI, there is a genuine issue of material fact regarding whether or not the Note as made failed to conform to what both parties intended. (R. 60-67).

VII.

FAILURE TO MAKE INTEREST PAYMENTS IS NOT DISPOSITIVE

Cantamar argues that DSI's failure to make interest

payments triggers a default under the Note. (Brief of Appellee, 27). This argument ignores the effect of the oral agreement for a condition precedent to the payment obligations set forth in the Note.

Cantamar also argues that DSI made some interest payments and then stopped, citing lack of funds. (*Id.*) This evidence is not conclusive. A reasonable inference from the facts is that DSI made some interest payments simply as an accommodation to Cantamar while waiting for Cantamar to obtain the promised loan and fulfill the agreed upon condition precedent. Whether making some interest payments would result in a waiver or estoppel is a question of fact which should not be resolved on summary judgment.

VIII.

DSI HAS NOT WAIVED ITS CLAIM THAT THE INTEREST RATES ARE UNENFORCEABLE

Cantamar argues that by agreeing to roll over the amounts due on the prior notes into the Note, DSI waived any claim that the interest rate in the Note is unenforceable. (Brief of Appellee, 41-42).

Waiver should not generally be determined on appeal from a motion for summary judgment:

> Waiver is an intensely fact dependent question, requiring a trial court to determine whether a party has intentionally relinquished a known right, benefit, or advantage.

IHC Health Services, Inc. v. D & K Management, Inc., 73 P.3d 320, 323 (Utah 2003) (emphasis added).

In a contract case, waiver requires proof of action inconsistent with contractual rights:

> Waiver of a contractual right occurs when a party to a contract intentionally acts in a manner inconsistent with its contractual rights, and, as a result, prejudice accrues to the opposing party or parties to the contract.

Interwest Construction v. Palmer, 886 P.2d 92, 98 (Utah App. 1995) (emphasis added).

In the present case, DSI's willingness to roll over accrued interest from prior notes into the Note must be viewed in the context of the ongoing agreement conditioning repayment on obtaining a $15 million loan. As Carl Champagne testified in his deposition:

> Q. You agreed to those interest rates?
>
> A. Yes, on the proviso that we were going to get the investment to pay all this off.

Deposition of Carl Champagne, July 13, 2004, at 53; R. 218) (emphasis added).

A reasonable inference from the foregoing testimony is that if the Note, or any portion of it, is to be repaid from DSI's income rather than from a large loan, then DSI did not agree to the high interest rates or the rollovers, and in such a case those rates and rollovers should be held to be unenforceable.

IX.

DSI'S ARGUMENTS AND EVIDENCE WERE PROPERLY PRESERVED FOR APPEAL

Cantamar contends that several of DSI's arguments, as well as DSI's Statement of the Case, should be stricken. (Brief of Appellee, 12, 14 n. 1).

All of the facts in the Statement of the Case, and each of the arguments Cantamar seeks to have stricken, were presented to the court below in opposition to the first Motion for Summary Judgment. (*Id.*)

Cantamar's argument, unsupported by any legal authority, appears to be that because DSI did not re-file opposing memoranda and affidavits in response to the Renewed Motion for Summary Judgment, they were not properly preserved for appeal. (Brief of Appellee, 12, 14 n. 1).

This argument disregards the facts and the law. The fact is that Cantamar, when filing its Renewed Motion, stated in the motion itself that it was based upon, *inter alia*, the Affidavit of Carl Champagne and "the pleadings on file in this action." (R. 188-189). Having formally acknowledged and relied upon the affidavit and pleadings already filed by DSI, Cantamar cannot reasonably fault DSI for failing to re-file the same pleadings.

The law, too, is more expansive than Cantamar in what should be considered by the appellate court on appeal from summary judgment. In *Brookside Mobile Home Park, Ltd. v. Peebles*, 48 P.3d 968 (Utah 2002), the Court held that an issue raised in connection with summary judgment did not have to be raised again in connection with a motion for reconsideration. The Court explained:

> [I]n order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. ... [O]nce trial counsel has raised an issue before the trial court, and the trial court has considered the issue, the issue is preserved for appeal.

Brookside, supra, 48 P.3d at 972 (emphasis added).

CONCLUSION

Summary judgment must be reversed and the case remanded for trial.

DATED this 10th day of March, 2006.

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CERTIFICATE OF SERVICE

I, Chris L. Schmutz, hereby certify that on the 13th day of March, 2006, I caused the foregoing Reply Brief of Appellants to be served on counsel for the Appellee by first class mail to the following address:

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